

IN THE DISTRICT COURT IN AND FOR CAMPBELL COUNTY, WYOMING

ROGER D. PFEIL and LINDA JO PFEIL, husband and wife, for themselves and for their minor children, and JOSEPH M. GILSDORF and KARLA J. OKSANEN,

Petitioners,

vs.

AMAX COAL WEST, INC., a subsidiary of Cyprus AMAX Coal Company, and ENVIRONMENTAL QUALITY COUNCIL of the STATE OF WYOMING,

Respondents.

**FILED**

NOV 17 1994

Terri A. Lorenzon, Attorney  
Environmental Quality Council

Civil Action No. \_\_\_\_\_

PETITION FOR JUDICIAL REVIEW

Petitioners, Roger D. Pfeil and Linda Jo Pfeil, husband and wife, on behalf of themselves and their minor children ("Pfeils") and Joseph M. Gilsdorf ("Gilsdorf") and Karla J. Oksanen ("Oksanen"), by and through their undersigned attorneys, hereby petition the Court for judicial review of the November 7, 1994 final decision of the State of Wyoming, Environmental Quality Council ("Council" or "EQC") granting the application of Respondent, Amax Coal West, Inc. ("Amax") for a Form 11 Revision of the 428-T2 surface coal mining permit for the Eagle Butte Coal Mine located in Campbell County, Wyoming. Copy attached hereto as Exhibit "A". In support of their Petition, Pfeils, Gilsdorf and Oksanen state the following:

I. Introduction.

Petitioners seek reversal of the EQC's November 7, 1994 Order granting Amax's proposed Form 11 Revision to the 428-T2 mining

permit for the Eagle Butte Coal Mine in Campbell County, Wyoming. A copy of that Order is attached hereto as Exhibit "A". Petitioners, Gilsdorf and Oksanen, also seek a remand to supplement the record under W.R.A.P. 12.08 and all Petitioners seek a remand for new notice and a new trial. The Revision, as granted, is illegal in numerous respects. It was accomplished with improper notice and approved in an arbitrary and capricious fashion without substantial evidence supporting the change in the order and schedule of mining it allows. The legal issues presented in this Petition are of statewide significance and involve constitutional questions of due process.

## **II. Facts and Statement of the Case.**

### **A. Parties and Venue**

1. Pfeils own and occupy real property at 209 Battle Cry Lane in the Rawhide Village Subdivision, Campbell County, Wyoming, roughly 1600 feet from the boundary of the Eagle Butte Coal mine. Pfeils lived in the subdivision before, during and after the Rawhide litigation and controversy which took place in 1988-89.

2. Oksanen and Gilsdorf own and occupy property at 205 Battle Cry Lane in the Rawhide Village Subdivision, Campbell County, Wyoming, also less than one mile from the permit boundary of the Eagle Butte Coal Mine. Oksanen and Gilsdorf have lived at this location since August 1989. They purchased their property and moved to Rawhide Village after the Rawhide litigation and controversy.

3. Amax is a corporation licensed to conduct business in the State of Wyoming. Amax operates the Eagle Butte Coal Mine in Campbell County, Wyoming.

4. The State of Wyoming Department of Environmental Quality ("DEQ") is a Wyoming governmental agency charged with enforcing the provisions of the Wyoming Environmental Quality Act.

5. The State of Wyoming, Environmental Quality Council ("EQC") is the adjudicatory and rule making body appointed by the Governor to carry out the provisions of the Environmental Quality Act.

6. This Court has jurisdiction to review this matter pursuant to W.S. 35-11-1001 (July 1994 Repl.), W.S. 16-3-114 (July 1990 Repl.) and W.R.A.P. 12.

7. This Court is the proper venue for these petitioners to seek judicial review of the EQC's final agency action pursuant to W.S. 16-3-114(a).

**B. Amax Revision Application for 428-T2 Mining Permit/Eagle Butte Coal Mine**

1. In 1990, Amax received approval from the DEQ of a renewal of its mine permit and plan for the Eagle Butte surface coal mine. Exhibits A-7 and A-14. This permit renewal occurred after the Rawhide Village controversy and litigation.

2. In the 1990 permit renewal application, Amax represented that it would mine coal in a south and easterly direction away from the Rawhide Village Subdivision for at least ten (10) years and that after mining began to approach the subdivision again it would not occur adjacent to the subdivision until the year 2015. Exhibit A-14.

3. At this time Amax also affirmatively represented to DEQ that while Amax did not believe its mining adjacent to Rawhide Village had caused the gas seepage and resultant evacuation there, mining south and east away from that area would insure that the hydrologic balance in that area would have an adequate chance to recover if there had been damage to it. Exhibit P-9 at page 16.

4. Prior to December 10, 1993, Amax inquired informally of DEQ whether it would be required to undergo public notice on a request to alter the sequence and timing of mining represented to the public in the 428-T2 renewal. Exhibit S-1. In this permit revision request, Amax sought to begin mining coal in a large up-dip seam immediately adjacent to Rawhide Village beginning in mid-1994. Id.

5. Prior to providing public notice or receiving approval of a revision to the 428-T2 permit, Amax chose to enter into a contract to provide high BTU coal to a midwestern utility known as SWEPCO. July 26, 1994 trial transcript at pages 93-94 and 122-23. At the time Amax entered into the SWEPCO contract it knew that it could only meet the delivery requirements of the contract if it could mine coal from the up-dip coal seam adjacent to Rawhide Village.

6. On December 10, 1993, Amax officially filed its written request for a Form 11 revision of the Eagle Butte 428-T2 Permit and mine plan. Exhibits S-1 and P-13. In this application Amax asserted that no public notice was required for the changes proposed in the revision. Id.

7. In a May 13, 1994 letter, DEQ informed Amax that the request would require public notice and comment. Exhibit S-3.

**C. Public Notice For Amax Form 11 Revision Application**

1. Amax and DEQ then produced a public notice that was to be published and mailed to neighboring land owners. See Exhibit "B" attached hereto (derived from Exhibit S-3).

2. Due process is inherent and is guaranteed in all administrative proceedings and procedures. Amoco Production Company et al. v. Wyoming State Board of Equalization, et al., Slip Op. Case No. 93-104 at page 9 (Wyo. October 6, 1994) and numerous cases cited therein. To satisfy due process requirements, public notice must comply with applicable statutory and regulatory requirements--a person should be able to read the notice and gain the required information from the face of the document. Devous v. Board of Medical Examiners, 845 P.2d 408, 416 (Wyo. 1993); White v. Board of Trustees, 648 P.2d 528, 535 (Wyo. 1982) cert. denied 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed.2d 956 (1983). This notice did not comply with a number of mandatory statutory and regulatory requirements, including:

a. Amax and DEQ's notice did not contain any substantive description of the change proposed in the revision. It did not describe what change in order and sequence of mining was proposed. It did not inform anyone that contrary to the 428-T2 permit, mining would commence adjacent to Rawhide Village in late 1994 instead of the year 2010. This violates W.S. 35-

11-406(j) and DEQ Land Quality Rules and Regulations, Chapter XIV, Section 3(a).

b. The notice does not contain an "outline or index indicating what pages, maps, tables, or other parts of the approved permit are affected by the revision ...." As specifically required in DEQ Land Quality Rules, Chapter XIV, Section 1.(b),(ii),(iii).

c. The notice does not explain the proposed future use of the affected land caused by the proposed radical change in the sequence and direction of mining. This violates W.S. 35-11-406(j).

d. The notice fails to describe that DEQ had determined the change in order and sequence of mining would have no impact on groundwater levels in the affected area without conducting or requiring any additional groundwater modeling based on the order and sequence of mining proposed in the revision. This violated W.S. 35-11-406(j) and DEQ Land Quality Rules, Chapter XIV, Section 1.(b), (ii), (iii).

e. The notice does not notify the recipients that if they wait until the July 6, 1994 deadline to file their objections they may have effectively waived their ability to conduct standard written discovery or to subpoena any records in a timely manner under the mandatory twenty (20) day time limit set out in W.S. 35-11-406(k).

These blatant flaws in the notice deprived the Pfeils and others of a fair and meaningful opportunity to understand what Amax was

proposing in the revision and how it might affect them. Most importantly, this flawed notice poisoned the proceedings in a way that deprived Pfeils, Gilsdorf and Oksanen of the ability to understand or prepare for the importance and magnitude of the issues raised by Amax's proposed revision.

3. DEQ admits that Amax's public notice does not comply with the law:

[W]e admit the notice did not comply with the rules. The notice did not contain an explanation of why Amax is seeking the revision in question. The notice did not contain an outline or index of changes to the permit. The DEQ regrets this error and intends to evaluate the notice requirements to ensure that future notices include all information required by law.

August 19, 1994 DEQ Supplemental Brief at page 2 attached as Exhibit "C".

4. Amax's pleadings never admit or deny that these flaws in the notice exist. Instead, Amax ignores them and arguing instead that the notice was somehow sufficient because it provoked a response from the Pfeils.

5. Under W.S. 35-11-406(j) Amax was required to publish a proper notice of its revision application and to "mail a copy of the notice to all surface owners of record of the land within the permit area, to surface owners of record of immediately adjacent lands, to any surface owners within one-half ( $\frac{1}{2}$ ) mile of the proposed mining site." This notice requirement is mandatory in the revision process.

6. Amax mailed the defective notice to Pfeils on about May 20, 1994. Pfeils received it on May 23, 1994.

7. Amax mailed a copy of the defective notice to Gilsdorf and Oksanen at an incorrect address at about the same time. Exhibit A-11.

8. In May and June 1994, the Campbell County land records showed Gilsdorf and Oksanen at an address of "205 Battle Cry Lane" in the Rawhide Subdivision. Gilsdorf and Oksanen were shown at this address in the Campbell County land records continuously since at least 1991. See Gilsdorf and Oksanen's Motion To Supplement The Record Pursuant To W.R.A.P. 12.08 And Alternative Motion For The Court To Take Judicial Notice Of Official Records From the Campbell County, Wyoming Assessor's Office filed contemporaneously with this Petition.

9. Gilsdorf and Oksanen did not receive any actual mailed notice about the revision from Amax until July 5, 1994, one (1) day before the public comment period ended. It was mailed to an address they had in 1989. Ms. Oksanen testified that she heard a rumor about a revision and called Amax on June 29, 1994 to inquire. During this phone call it was discovered that the Oksanen and Gilsdorf's mailed notice had been sent to the incorrect address. After this phone call Amax mailed a copy of the notice to Oksanen and Gilsdorf at their correct address. Consequently, Oksanen and Gilsdorf received one (1) days notice of Amax's proposed revision.

**D. Pre-Trial Procedures.**

1. Gilsdorf and Oksanen filed a pro se objection to the Amax revision on July 5, 1994.

2. Pfeils filed a pro se objection to Amax's revision on July 6, 1994 based on the deadline described in the defective notice. They filed a supplemental set of objections through counsel on July 21, 1994.

3. The EQC received the objections and set a hearing date of July 26, 1994.

4. Pfeils could not obtain consent from Amax or DEQ to continue the July 26, 1994 hearing. They moved for a continuance of the hearing date on July 20, 1994.

5. Pfeils filed written discovery requests on July 21, 1994 which were never responded to by Amax.

6. Pfeils filed a Motion for an informal conference on July 21, 1994. That request was denied by Dennis Hemmer of DEQ on July 22, 1994.

**E. July 26, 1994 Trial On Pfeil, Oksanen and Gilsdorf Objections**

1. At trial Pfeils appeared and participated with counsel. Gilsdorf and Oksanen appeared and participated pro se.

2. The issues entertained by the Hearing Examiner at trial included Pfeils' arguments for a continuance, notice problems and the question of whether the DEQ had properly analyzed and assessed the effects the change in mining sequence and timing would have on groundwater levels in and around Rawhide Village. Pfeils, Gilsdorf and Oksanen also expressed concerns about the effects of blasting within 600 feet of the subdivision sewage facility and within 1600 feet of their home.

3. Roger D. Pfeil testified that after the Rawhide litigation ended, the Pfeils understood the mine would progress south and east away from Rawhide Village for many years before it again approached the Pfeil home. Id. at 309-10. He testified that this aspect of the mine plan was a big part of the Pfeils' decision to move back into their home and to stay there. Id.

4. Amax employees testified that they had mined near Rawhide Village in the past and that they had knowledge and understanding about the coal that was available in that area of the permit. Id. at pages 93-94; 111-14. They also testified that Amax made a knowing and voluntary decision in 1990 to change the direction of mining in the pit away from Rawhide Village to mine in a south and easterly direction even though it was desirable at the time to mine the face of the coal seam adjacent to Rawhide Village. Id. at 113. They verified that when the 428-T2 Permit for Eagle Butte was renewed in 1990, Amax affirmatively represented to the DEQ in public documents that they planned to mine in a south and easterly direction away from Rawhide Village until the year 2007 when mining would begin approaching that area. Id. at 132; Exhibit A-7 and referenced maps.

5. Amax employees admitted that in late 1993 or January 1994 Amax knowingly obligated the Eagle Butte mine to deliver high BTU coal to a midwestern utility company. Id. at 123-27. At the time Amax entered into this contract it knew it could only meet the contract terms by mining coal adjacent to Rawhide Village. Id. At the time Amax obligated itself to that contract Amax knew it had not

formally applied for or received a permit revision to the 428-T2 Permit to allow it to radically change the order and sequence of mining and to begin mining adjacent to Rawhide Village. Id.; see also id. at 192-93.

6. Amax first sought to obtain the revision to the 428-T2 Permit allowing mining adjacent to Rawhide Village in 1994-95 without public notice. Id. at 141-43; Exhibit S-1. The DEQ rejected that request and required a formal "significant" revision application which would include mandatory public notice pursuant to W.S. 35-11-406(j) and DEQ rules and regulations. July 26, 1994 trial transcript at page 143; Exhibit S-3.

7. At trial Amax witnesses admitted that part of the mining plan in the revision required dewatering of overburden adjacent to Rawhide Village. July 26, 1994 trial transcript at page 138-40.

8. Amax's groundwater hydrologist, Doyl Fritz, also testified that he had previously modeled projected groundwater drawdowns at Eagle Butte in 1990 using a MODFLOW groundwater computer model. He explained that the MODFLOW model was cumulative, such that each successive model relies upon data and conclusions generated by the last model. Id. at pages 218-19; 223-24. He admitted that no MODFLOW groundwater modeling predicting the affects of mining in the order and sequence proposed in Amax's revision had ever been done. Id. at 224-25. This was confirmed by testimony from Amax witness Hutten. Id. at pages 137-38; 193-94.

9. Mr. Fritz admitted that many of the values he placed in the model to predict groundwater drawdown from mining were based on his

own personal interpretation of the groundwater characteristics in the area--not on hard data. Id. at pages 213-18. He agreed that other experts might review the data that had been available to him in 1990 and arrive at different conclusions about the values that could be placed in the MODFLOW model to predict groundwater drawdowns under Rawhide Village due to mining at Eagle Butte. Id. at pages 212-28.

10. Mr. Fritz also admitted that when he had merely updated the MODFLOW model in 1990 he had a staff of four to five people work on the project for three to four months to complete the MODFLOW modeling. Id. at 209-211.

11. Mr. Fritz admitted that for another expert to verify his 1990 MODFLOW modeling and his conclusions about the affects on the hydrologic balance in the area based on the order and sequence of mining represented in the 428-T2 permit, they would need an opportunity to review his input values for the model and to run it themselves. Id. at 226-28.

12. Last, and most important, Mr. Fritz admitted that the conclusion he offered in direct testimony that no groundwater modeling was necessary to predict the hydrologic impacts of Amax's proposed Form 11 revision was **speculation** on his part. Id. at page 232, lines 6-10.

13. Pfeils' expert witness, Walter Merschhat, who also testified that an expert hydrologist could not set up and run the MODFLOW groundwater modeling at issue in this case in two months or less. Id. at 299-301.

14. Despite the undisputable conclusions that: (a) there is no groundwater modeling available to predict the affect of mining as proposed in Amax's revision on the hydrologic balance under Rawhide Village; and, (b) no one could have completed discovery and retained a hydrology expert who could have set up and run the MODFLOW modeling based on the mining scenario proposed in the revision in the time allotted to the Pfeils after they received notice of the revision application on May 23, 1994, the motion for a continuance was denied.

15. At the end of the July 26, 1994 hearing. Pfeils' Motion for a continuance was renewed and denied. At that time, the Hearing Examiner solicited post-hearing briefs and reply briefs on the issue of notice by all parties to be filed in August and September.

16. Pfeils filed a brief through their counsel again renewing their Motion for a continuance.

17. Oksanen and Gilsdorf filed a pro se post-hearing brief. The improper service of notice on them was raised in this pleading.

**F. EQC Decision Making Process -- October 5, 1994 Casper Meeting -- Council Members Lee and Thompson Force A Deadlock.**

1. After the record was closed the EQC held a public meeting in Casper, Wyoming on October 5, 1994 to review the record and the post-hearing briefs and to attempt to render a decision. Council member Cannon was recused and did not participate. Council member Morris was absent. Council members Carr, Darrington, Bergman, Lee and Thompson were present and participated.

2. During this meeting Pfeils renewed their Motion for a continuance. After discussion, the EQC passed a motion denying the continuance request.

3. Next, council member Vince Lee noted the DEQ's admission that the notice sent to the Pfeils and requested by Oksanen and Gilsdorf was defective and did not comply with the law. Council member Lee made a motion to require Amax and DEQ to require Amax to issue, mail and publish a new notice that was in compliance with Wyoming law and DEQ regulations. In presenting and discussing this motion, council member Lee stated:

**Mr. Lee:** I voted against the continuance because I guess I kind of agreed in this particular case Pfeils (sic) should have known better because they should have known that in this particular case . . . they should have jumped on this thing because you know what's going on there but now isn't the issue the Pfeils it's just citizen X[, ] either we play by the rules or we don't. For all we know some guy could have been involved that wasn't there ten years ago, didn't know what was going on. You know, and if its true that the notice, as it appeared in the paper did not comply with DEQ rules, that's a direct quote from the Department itself; you know, if I were a protestant that had just arrived on the scene, I think I'd have a real strong case to say that everything that followed therefore also didn't meet DEQ rules. . . . If we allow notice that quotes, does not meet DEQ rules to precipitate a hearing that has some substantial outcome, what's the point of having rules.

Transcript of October 5, 1994 EQC meeting at page 27, lines 23, page 28, lines 1-19 (emphasis added). See also Id. at pages 25-26, 39-40. Later, Mr. Lee also stated in response to a statement that Amax and DEQ stated the defects in the notice do not matter:

**Mr. Lee:** Yeah, that's like saying in this case, officer, 75 is okay because there's nobody on the road and its dry. Come on. Once you accept an argument like that you might as well not have rules. In that case all your saying, in this case we don't care about the rules, it's okay. . . . However trivial the deficiency may be, I mean that maybe is another question.

I'm not sure it was trivial. If I understood the record here Amax didn't want to do notice at all. . . . So it's pretty obvious whoever sat down to write the notice once the Department said by the way you are going to need notice, it's pretty clear what his philosophy was, what he had in the back of his mind and I don't fault Amax for that, they're's trying to run a mine, but I do fault the Department, because somebody in the Department read that draft and said, yeah, this will do. And now their own attorney comes back six months later and says, well, it didn't quite meet the rules. Now, I don't think that's good. And I don't know that the deficiency was all that trivial.

Id. at page 32, lines 11-23 (emphasis added).

Similarly, Council member Thompson stated:

Mr. Thompson: It seems to me that, you know, I am persuaded by Mr. Wendtland's argument that you cannot read the notice and gain any understanding of how the mining schedule will change or where mining will occur under the proposed vision (sic). The whole purpose of this thing is to let folks know they're trying to change the mining schedule, and if the notice doesn't comply with the DEQ rules, and if you can not read the notice, and I've read the notice, and understand it to be a change, I just -- I just can't see that is the complete notice that were trying to inform the public about, or trying to inform the public with. So I'm persuaded by Vince's argument that I don't know what we've got -- If were going to set rules, we're going to be the body that promulgates those rules, and essentially interprets those rules, we've got to live by them and can't go, you know -- can't allow a single instance in which, yes, we've got these rules set up, but on the other hand here everybody should be - - should have a heightened sense of awareness, you know because of the problem here. I don't think we can make that kind of exception.

Id. at page 35, line 25 and page 36, lines 1-21 (emphasis added).

4. After this discussion council members Lee and Thompson moved and voted to send the revision back for new notice and opportunity for hearing. Council members Darrington and Carr voted against that motion. Council member Bergman did not vote after he determined that the motion could not pass on three votes.

5. Another motion was then made to approve the revision and it failed with council members Lee and Thompson voting no and council member Bergman abstaining.

6. The matter was then reconsidered and tabled for a subsequent meeting in which council member Morris could participate.

7. On October 21, 1994 Gilsdorf and Oksanen retained counsel and an entry of appearance was made on the record in their behalf.

**G. EQC Decision Making Process -- October 24, 1994 Green River Meeting -- Council Member Lee Changes His Mind.**

1. A second meeting to decide the matter was then held in Green River on October 24, 1994. Present at this meeting were council members Lee, Thompson, Morris, Carr, Darrington and Bergman.

2. At this meeting the notice issue and approval of the revision were again discussed. Council member Lee reiterated his position concerning the notice problems he described at the October 5, 1994 hearing. An informal poll was taken and the Council split three to three with Council members Lee, Thompson, and Morris voting to remand the application for new notice, publication and hearing and Council members Darrington, Carr and Bergman voting to approve the revision. After this result was clear Council members Bergman and Lee had the following exchange:

**Mr. Bergman:** Let me, as a matter of compromise, is that in the power of the hearing examiner, to hold the Department in contempt and throw them in jail?

**Mr. Darrington:** More seats on the plane going back.

**Ms. Lorenzon:** He's only been admitted here for a couple months.

**Mr. Lee:** I got a compromise. I'll change my vote. I'm convinced by what Fred said a moment ago, if the purpose of my

vote against this was to gain the attention of the Department, and maybe Amax, to be a little more careful what advice they take from the Department in the future, I think that purpose has probably been accomplished.

Tom Roan here promises that the next time the Department will do it right, and I'll make a promise that the next time I won't change my vote, but this time I will. I'll vote for the motion.

Transcript of October 24, 1994 EQC hearing at page 52, lines 20-25 and page 53, lines 1-13 (emphasis added). Without any substantive explanation and after championing the proposition that Amax's notice was defective and should be reissued, Council member Lee arbitrarily changed his prior strong position about defective notice, arbitrarily changed his vote, and allowed Amax's revision to be approved with a defective notice on a vote of four to two.

3. On November 7, 1994, the EQC entered its final order approving Amax's Form 11 Revision application to allow Amax to alter the order and sequence of mining at the Eagle Butte surface coal mine allowing mining immediately adjacent to Rawhide Village in 1994 and 1995.

### III. Issues For Review.

Pfeils, Gilsdorf and Oksanen seek judicial review of the EQC's action approving Amax's Form 11 Revision application on the following grounds:

A. The EQC's approval of Amax's Form 11 Revision violates W.S. 16-3-114 because it is:

- arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
- contrary to constitutional right, power and privilege;

- without observance of procedure required by law; and,
- unsupported by substantial evidence in the official record of the proceedings below.

Specifically, the decision is defective under W.S. 16-3-114 for the following reasons:

**1. Gilsdorf and Oksanen -- Failure To Mail Notice In A Timely Manner.**

Amax and the DEQ failed to provide Gilsdorf and Oksanen with proper and timely notice pursuant to W.S. 35-11-406(j). These protestants did not receive mailed notice of the Amax's Form 11 Revision until July 5, 1994--one day before the deadline set by the EQC for filing objections. This failure to provide notice to Gilsdorf and Oksanen violated W.S. 35-11-406(j) and denied these protestants due process.

**2. Gilsdorf, Oksanen and the Pfeils -- Defective Notice.**

**a. The Notice Did Not Concisely Explain The Substance Of The Proposed Revision.**

The Notice never complied with the requirements of W.S. 35-11-406(j) or DEQ Land Quality Rules Chapter XIV, Section 3 (a). The notice does not provide specific dates of commencement showing the change in the order and sequence of mining proposed and the location of the changes in the order and sequence of mining. The notice does not set out the specific calendar dates on which the proposed revision in the order and sequence of mining will occur. The notice does not explain the proposed future use of the affected land in the context of the proposed change in the order and sequence of mining. An average person acting in the capacity of

citizen protestor in these proceedings could not read the notice and gain any understanding of how the mining schedule will change or where mining will occur under the proposed revision.

**b. The Notice Lacked A Required Index.**

The notice violates DEQ Land Quality Rules Chapter XIV, Section 1.(b), (ii), (iii). The notice does not contain an "outline or index indicating what pages, maps, tables, or other parts of the approved permit are affected by the revision ...."

**c. The Notice Failed To Address Potential Affects Of the Proposed Revision On The Hydrologic Balance In The Area.**

The notice violates W.S. 35-11-406(j) and DEQ Land Quality Rules Chapter XIV, Section 1.(b), (ii), (iii). The notice does not inform the reader that DEQ has concluded that the proposed change in the order and direction of mining will have no affect on the hydrologic balance under the subdivision although DEQ required no groundwater modeling to predict the potential affects of the proposed Form 11 Revision.

**d. Notice Was Misleading Concerning Discovery.**

The notice is misleading and fails to inform the protestants about the unavailability of discovery under the twenty (20) day hearing schedule mandated by W.S. 35-11-406(k). While the notice very specifically sets forth a deadline by which objections must be filed and a hearing held but contains absolutely no explanation to citizen protestors that if they wait until the deadline to file an objection they will have essentially no right or ability to complete discovery prior to trial. Compare July 26, 1994 trial transcript at page 105, lines 19-23 (remarks of Amax counsel

concerning Amax's alleged inability to respond to Pfeils' discovery). The notice creates a procedural trap in which an unsophisticated citizen protestor is led to believe they will have a right to a fair constitutionally meaningful hearing on complicated scientific issues, but in reality forces them to litigate against a highly funded mining corporation with no discovery and no preparation.

**3. W.S. 35-11-406(k) Denied Gilsdorf, Oksanen and the Pfeils Due Process.**

The application of the procedures set forth in W.S. 35-11-406(k) which require that a hearing be set within twenty (20) days after the deadline for objections to Amax's application denied these petitioners a fair and meaningful hearing because they were denied a fair and meaningful opportunity to:

- a. conduct discovery prior to the July 26, 1994 trial de novo to the EQC;
- b. locate and retain expert witness testimony; and,
- c. have their own experts review and analyze pertinent information obtained in discovery from Amax and to analyze data and form conclusions about the technical matters at issue.

**4. EQC Decision Making Process Was Arbitrary And Capricious.**

The EQC's decision to approve the revision was arbitrary and capricious for the following reasons:

**a. EQC Decision To Approve Amax's Form 11 Revision Was Flawed.**

As set out above, the Council debated Amax's Form 11 Revision application in two public meetings. At the October 5, 1994 meeting

the Council deadlocked on a motion by Council member Lee to send the application back for new notice and another hearing. At the October 24, 1994 meeting the Council deadlocked again on a motion by Council member Darrington to approve the application. Council member Lee again argued that the defective notice in the case required that it be sent back for new notice and another hearing. Then, without any factual basis or other substantive explanation, Council member Lee abruptly changed his vote and facilitated approval of Amax's petition. Gilsdorf, Oksanen and Pfeils contend that Council member Lee's unexplained and unsupported change of vote after his repeated efforts to remand Amax's application because of defective notice was arbitrary and capricious and is not supported by substantial evidence.

*NOT  
true*

**b. EQC Decisions Concerning Gilsdorf and Oksanen Were Never Substantively Discussed In a Public Meeting.**

Despite having two full public meetings at which Amax's Form 11 Revision application was discussed, the EQC completely ignored Gilsdorf and Oksanen's claims. Findings prejudicial to Gilsdorf and Oksanen are included in the final order concerning Gilsdorf and Oksanen which were never discussed or approved by the Council in a public meeting.

*not  
true*

**5. The Mandatory Twenty Day Time Limit In W.S. 35-11-406(k) Is Unconstitutional As Applied To Gilsdorf, Oksanen and the Pfeils.**

The twenty (20) day time limit in W.S. 35-11-406(k) as applied in this case denied all the protestants due process. The statute created an unfair procedural trap for these unwary citizen protestors because it effectively denies them any discovery prior

to a hearing before the EQC. The statute created an unfairly short time period for these citizen protestors to prepare for trial, particularly if they need expert witness testimony.

**6. Denial of Pfeils' Repeated Requests For A Continuance Prejudiced Their Rights And Denied Them A Full and Meaningful Due Process Hearing.**

The decisions of the Hearing Examiner and the EQC to deny the Pfeils' repeated and timely requests for a continuance of the July 26, 1994 trial prejudiced them. Uncontroverted testimony from Amax employees and Amax's expert hydrologist shows conclusively that even had the Pfeils began conducting expedited discovery immediately after they received service of the defective notice on May 23, 1994, they could not physically have completed that discovery, retained an expert hydrologist and completed a basic technical review and verification of Amax's hydrologic speculations about the effect of the Form 11 Revision before July 26, 1994. Pfeils were irrevocably prejudiced in their ability to prepare and present their case before the Hearing Examiner in this regard.

**7. The Mandatory Twenty Day Time Limit In W.S. 35-11-406(k) Is Facially Unconstitutional.**

The twenty (20) day time limit in W.S. 35-11-406(k) denies all citizen protestors due process. The statute creates an unfair procedural trap for unwary citizen protestors because it effectively denies them any discovery prior to a hearing before the EQC. The statute creates an unfairly short time period for citizen protestors to prepare for trial, particularly if they need expert witness testimony.

**8. Substantial Evidence Was Not Presented To Support Approval Of The Form 11 Revision.**

The EQC's decision to approve Amax's Form 11 Revision is not supported by substantial evidence:

**a. Ground Water Modeling.** Amax has not established that the change in sequence and order of mining it proposes will not adversely affect the hydrologic balance under and around the Rawhide Village Subdivision. No valid groundwater modeling based on the mining scenario proposed Form 11 revision exists to support Amax's assertion that there will be no hydrologic damage.

**b. Timing And Reliance.** Amax has not established that it should be entitled to abruptly change the order and sequence of mining represented in the 428-T2 renewal application and permit that Gilsdorf, Oksanen and the Pfeils relied on. The protestants property has little market value and they should be allowed to rely upon Amax's representations that it would not mine coal adjacent to Rawhide Village Subdivision until at least the year 2007. Amax should also be estopped to use economic necessity as a basis for seeking the request to change the order and sequence of mining. Amax knew the value, quality and desirability of mining coal in 1990 when Amax made an independent decision to turn south and east and mine away from the subdivision. Amax had this same knowledge in 1991 when it applied for the 428-T2 Permit renewal and again represented that it would mine south and east away from the subdivision. Amax chose to wait until late 1993 to enter into a coal purchase contract that apparently requires it to deliver higher BTU coal that it can only obtain from the large coal seam

adjacent to Rawhide Village. Amax knowingly chose to enter into that contract without first applying for and receiving a revision to the 428-T2 permit. Amax knowingly and voluntarily created the economic bind it currently finds itself in. The equities of the situation should be balanced in favor of the Protestants who will be irrevocably damaged if Amax is allowed to radically alter the order and sequence of mining now.

**c. Mandatory Mail Notice To Gilsdorf and Oksanen.** Amax did not establish that it delivered proper mail notice to Gilsdorf and Oksanen pursuant to the requirements of W.S. 35-11-406(j) and associated DEQ rules and regulations.

**d. Improper Presumptions About Prior Knowledge Of Pfeils.** The EQC lacked substantial evidence to conclude or presume that the admittedly defective notice mailed to Pfeils was adequate to inform them about Amax's proposed revision simply because the Pfeils were parties to the Rawhide litigation settlement.

**9. Pfeils Were Denied Access To Documents Accumulated By The DEQ Concerning DEQ's Investigations Of Rawhide Village In 1988-90 In The Sheridan, Wyoming DEQ Office.**

In a pre-trial affidavit of DEQ employee, John Sweet, and at trial, DEQ officials admitted that the Pfeils' attorney was denied access to several boxes of documents in the control of DEQ prior to trial. These boxes were unavailable because DEQ was moving its Sheridan office and the boxes were in storage. These boxes contained documents describing DEQ's investigations of the Rawhide Village Subdivision area in 1988-90 after the Rawhide controversy occurred. The Pfeils were denied due process when they were forced

to trial at a time when these documents were not readily available to their attorney as the defective notice purported they would be.

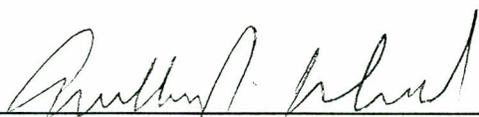
**IV. Conclusion and Prayer For Relief.**

Petitioners respectfully request the Court to accept this matter for judicial review pursuant to W.R.A.P. 12 and to certify this matter to the Wyoming Supreme Court pursuant to W.R.A.P. 12.09 for docketing as soon as possible.

DATED this 15th day of November, 1994.

DAVIS and CANNON

By:

  
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Anthony T. Wendtland  
Attorney for Petitioners  
P. O. Box 728  
Sheridan, Wyoming 82801  
(307) 672-7491

CERTIFICATE OF SERVICE

I, Anthony T. Wendtland, attorney for the Petitioners in the above-entitled and numbered cause do hereby certify that on the 18th day of November, 1994, I caused a true and correct copy of the Petition for Judicial Review to be served by placing the same in the United States mail, postage prepaid at Sheridan, Wyoming, to:

Marilyn S. Kite  
Holland & Hart  
P. O. Box 68  
Jackson, Wyoming 83001

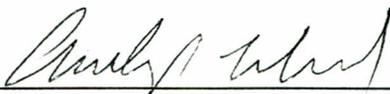
Mr. Steven R. Youngbauer  
Amax Coal West, Inc.  
P.O. Box 3039  
Gillette, WY 82717-3039

Terri A. Lorenzon, Attorney  
Environmental Quality Council  
2301 Central Avenue, Room 407  
Cheyenne, Wyoming 82002

Mr. Dennis Hemmer, Director  
Department of Environmental Quality  
122 West 25th Street, Herschler Building  
Cheyenne, Wyoming 82002

Richard Chancellor, Acting Administrator  
Land Quality Division  
Department of Environmental Quality  
122 West 25th Street, Herschler Building  
Cheyenne, Wyoming 82002

Thomas A. Roan  
Assistant Attorney General  
Attorney General's Office  
123 Capitol Building  
Cheyenne, Wyoming 82002

  
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Anthony T. Wendtland